IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-956

MISSISSIPPI GAY ALLIANCE and ANNE DEBARY,

Petitioners,

—v.—

BILL GOUDELOCK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 12, 1976.

Opinions Below

The opinion of the United States District Court for the Northern District of

Mississippi, which is unreported, is set out in the appendix, infra, pp. 1a-19a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 536 F.2d 1073 and is set out in the appendix, infra, pp. 20a-40a.

Jurisdiction

The judgment of the Court of Appeals was entered on August 12, 1976 (App., infra, p. 41a). A timely petition for rehearing was denied on October 13, 1976 (App., infra, p. 43a). The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

Questions Presented

Whether the First Amendment forbids a student newspaper published at a state university with funds collected and disbursed by the university, from refusing to publish a noncommercial advertisement solely because of its subject matter.

Statement of the Case[1/]

The petitioner, Mississippi Gay Alliance [hereinafter MGA] is an association

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1/ The Statement of the Case is taken from allegations in the complaint, which are taken as true on a motion to dismiss. Conley v. Gibson, 355 U.S. 41 (1957), and from the record below.

comprised primarily of homosexuals whose purpose is to provide a forum where ideas may be discussed, information disseminated, and members freely associate between themselves and their friends. On August 16, 1973, MGA, through one of its officers, submitted a paid advertisement to be placed in The Reflector, a newspaper published by students at Mississippi State University, an institution of higher learning supported and controlled by the State of Mississippi. The advertisement read as follows:

> Gay Center - open 6:00 to 9:00 Monday, Wednesday and Friday nights.
>
> We offer - counselling, legal aid and a library of homosexual literature.
>
> Write to - The Mississippi Gay Alliance
> P.O. Box 1328,
> Mississippi State University
> Mississippi 39762

The editor of The Reflector, Bill Goudelock, one of the respondents in this case, refused

to accept the tendered paid advertisement. The Reflector at that time printed paid and unpaid advertisements, bulletins and announcements of a commercial, political, social, religious and informative nature.

Thereafter, on February 8, 1974, petitioner Anne DeBary, chairwoman of MGA, presented an announcement to The Reflector, designating that it be placed in the "briefs" section of the newspaper. The Reflector regularly accepted announcements for the "briefs" section free of charge to campus local organizations. A staff writer for The Reflector informed Debary that the announcement would be given to defendant Goudelock. The announcement was never printed in the newspaper.

On March 1, 1974, suit was filed to compel publication of MGA's advertisements by The Reflector. Included as defendants, in addition to Bill Goudelock as editor of The Reflector, were Henry F. Meyer, a faculty member alleged to be faculty advisor to The Reflector; Sam Dudley, Chairman of the Communications Department; and William L. Giles, President of Mississippi State University.

In addition to the facts set out above, the complaint alleged in paragraph nine that:

> The Reflector is the official newspaper of MSU, a state supported and

> controlled institution of higher learning. The major portion of The Reflector's financing comes from the Student Activity Fund which is collected by MSU and disbursed to The Reflector. The Reflector is printed on MSU facilities and it is an organ of MSU.

On July 3, 1974, the defendants (except defendant Goudelock) filed a motion to dismiss on the following stated grounds (R. Item 16):[2/]

1. That the plaintiffs herein lack standing.

2. That the record clearly indicates and the plaintiffs have so admitted that this action was improvidently brought in bad faith.

3. That the plaintiffs are not before this Court with clean hands.

2/ The papers contained in the original record are not consecutively paginated; rather, each separate document is consecutively numbered. "R.Item" refers to that latter number. If followed by a page reference, it refers to the internal pagination of the document.

On July 17, 1974, the district judge filed an order which in relevant part read (R. Item 18):

> It is further ordered that a full evidentiary hearing on defendants' motion to dismiss, including questions of standing and other defenses in bar (except and apart from a merits consideration), be scheduled for . . . October 18, 1974.

On October 25th, the adjourned hearing date, the district judge opened the proceedings by stating (R. Item 28, p. 2): "All right, then, based on the Court's prior connection and familiarity with this case, it would invite stipulation of counsel on these points" (Id. at pp. 2-3).

Defendants' counsel was quick to accept the invitation to so stipulate, but plaintiffs' attorney expressed reservations. After some discussion, the following stipulations were agreed upon (Id. at pp. 4-11): (1) the named plaintiffs are not students at Mississippi State University; (2) the Mississippi Gay Alliance is not a recognized student organization at MSU; (3) Goudelock was elected editor of The Reflector in a student body election at MSU, and that he serves one calendar year; (4) "that no funds from the state treasury or other state funds flow into the campus newspaper at the university," but the funds used to support

the newspaper "are collected by the University as part of a non-waivable fee which are then transmitted back to the students"; (5) and that defendants Giles, Meyers and Dudley acquiesced in defendant Goudelock's decision and did not give Goudelock any contrary instructions. [An additional stipulation that no members of MGA were students at MSU was later withdrawn by order of the district court (R. Item 25)]. The court then held that:

1. The inaction of defendants Giles, Meyers and Dudley "can in no way be subject to Fourteenth Amendment principles" (Id. at p. 8; App., infra, p. 11a) and

2. The newspaper "does not constitute state action in any accepted sense of the term" (Ibid.).

The court went further and held on the merits that The Reflector was not required to publish MGA's ads, relying explicitly on Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), decided only a few months earlier. The court continued (R. Item 26, pp. 12-13; App., infra, p. 18a):

> "As I read these cases, he [Goudelock] had the undoubted right to exercise an editorial judgment on what to put in or what not to put in the paper. That is a freedom that belongs to the press of

America. How they exercise that right is up to those who publish printed material, free of judicial control.

The First Amendment protects them specifically in their decision-making about what to print. For this Court to order that any particular publication be run in a newspaper like "The Reflector" would be overriding the constitutionally protected freedom of the press."

The court then concluded (Id. at p. 13; App., infra, p. 19a).

"For these reasons, it is perfectly clear that the defendants' motion to dismiss should be sustained. Moreover, the Court, of its own motion, notes that the remaining defendant, Bill Goudelock, at the time of this action, editor of "The Reflector," is not liable to plaintiffs as a matter of law. The Court will dismiss the action finally with prejudice."

On appeal, the Fifth Circuit affirmed, one judge dissenting. The majority seems to have held that there was no state action because "The complaint did not allege and the stipulations did not assert that University officials supervise and control what is to be published or not published in the newspaper" (App., infra, p. 22a).

The opinion also went to the merits by citing Miami Herald v. Tornillo, supra, and stating that ". . . since the record really suggests nothing but discretion exercised by an editor chosen by the student body, we think the First Amendment interdicts judicial interference with the editorial decision" (Ibid).

Judge Goldberg, dissenting, concluded in a closely analyzed opinion (App., infra. p. 39a), that the First Amendment and the Equal Protection Clause require state-supported newspapers to provide non-discriminatory access to their advertising columns. He would have remanded for appropriate fact-finding of unresolved factual issues.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court. The decision below is also in conflict with the decision of another court of appeals on the same matter.

1. The question in this case is whether the first amendment, in conjunction with the equal protection clause of the fourteenth amendment, forbids a state-supported or controlled newspaper which accepts some editorial advertisements from rejecting others because the editors find the subject matter objectionable. On the

one hand, the question implicates the long line of public-forum cases decided by this court;[3] on the other hand, it implicates Miami Herald v. Tornillo, 418 U.S. 241 (1974).

The public-forum doctrine holds in general that a publicly supported or controlled facility that is made available for the expression of one or more points of view, cannot be denied "to those wishing to express less favored or more controversial views." Police Department v. Mosley, supra at 96. Tornillo holds that, as to owned publications, "compulsion to publish is unconstitutional.[4] Both lines of cases express the correct constitutional doctrine in the clear case, but they compete for

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3/ E.g., Niemotko v. Maryland, 340 U.S. 268 (1951); Edwards v. South Carolina, 372 U.S. 229 (1963); Police Department v. Mosely, 408 U.S. 92 (1972); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975).

4/ Earlier circuit court decisions had come to the same conclusion. Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971); Associates and Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971).

the proper resolution of the case at bar where the question is whether the constitutional balance should favor the fact that the facility is state supported or controlled, or by the fact that the facility is a newspaper.[5]

We believe that the fact of state support or control should govern the decision of the case, for the principle at the bottom of the public-forum doctrine should apply no matter what particular form the facility takes. As stated in Southeastern Promotions v. Conrad, supra at 553, that principle is "simply, that the danger of censorship and of abridgement of our precious first amendment freedoms is too great where officials have unbridled discretion over a forum's use." That principle was violated in this case by the refusal of the student editor of the state-supported newspaper to publish petitioners' advertisement because its contents were thought to be objectionable, though the newspaper regularly published other announcements of a commercial, political, social and religious nature.[6]

5/ Compare Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

6/ Petitioners expressly disclaim a right of access to the newspaper's news or editorial column. That claim would violate first amendment principles. See Avins v. Rutgers, State University of New Jersey, 386 F.2d 151 (2nd Cir. 1967), cert. denied, 390 U.S. 920 (1968).

Resolution of the question presented in this case is important because virtually every public educational facility, at least at the university and secondary school level, supports a student newspaper. Most if not all of them are supported by public funds to one degree or another. The question of access to such newspapers has arisen frequently in the past (see, e.g., cases cited infra, point 2) and there is no reason to believe that they will not arise at least as frequently in the future. Apart from that particularized reason, the case is also important because it gives the Court the opportunity, at one and the same time, to serve the first amendment interests of the public-forum doctrine, while drawing a bright line which will protect the student-editor's own first amendment rights.7/

2. There is also a conflict in the circuits on the question presented in this

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7/ If the censorship had been imposed by university officials, the student editor would of course have had his own first amendment claim against those officials. See, e.g., Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973), affirmed as modified, 489 F.2d 225 (en banc). But where the student editor is, as here, the engine of censorship, he stands in the shoes of the state and is subject to constitutional limitations.

case, the Seventh Circuit having held in Lee v. Board of Regents, 441 F.2d 1257 (1971), that a state-supported or controlled newspaper could not reject editorial advertisements. The court said that "a state public body which disseminates paid advertising of a commercial type may not reject other paid advertising on the basis that it is editorial in character." That holding is in direct conflict with the holding of the Fifth Circuit in the case at bar. Two district courts have come to the same conclusion: Zucker v. Panitz, 299 F.Supp. 102 (SDNY 1969); Radical Lawyers Caucus v. Pool, 324 F.Supp. 268 (W.D. Texas 1970).

Conclusion

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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January 11, 1977

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MISSISSIPPI GAY ALLIANCE, ET AL

vs. NO. EC-74-28-K

BILL GOUDELOCK, ET AL

RULING OF THE COURT

BY THE HONORABLE WILLIAM C. KEADY, CHIEF JUDGE

October 25, 1974
Oxford, Mississippi

THE COURT:

Gentlemen, the Court is prepared to rule on the motion to dismiss filed by the defendants other than Bill Goudelock, namely William F. Giles, William F. Meyers and Sam Dudley.

On this motion, there are no essential facts that are in dispute. It has been stipulated by the parties that the named plaintiffs are not students of Mississippi State University, that the Gay Alliance is not a student organization and that plaintiffs do

not sue on behalf of any students at Mississippi State University.

On August 16, 1973, the Mississippi Gay Alliance, acting by Anne DeBarry, submitted an advertisement to Bill Goudelock, editor of "The Reflector," the Mississippi State student newspaper. The ad read: "Gay center open six o'clock to nine o'clock Monday, Wednesday and Friday nights. We offer counseling, legal aid and a library of homosexual literature. Write to the Mississippi Gay Alliance, P.O. Box 1328, Mississippi State University, Mississippi, 39762." Goudelock refused to accept the ad and to run it in the newspaper.

"The Reflector" is a campus newspaper financed largely by monies from the student activity fund collected from the enrolled students by University officials and distributed to the campus publication fund. Sup-

plementing student funds are private funds and other monies, no portion of which is state funds. In other words, there are no state appropriations from the state treasury or other public monies which support the operation and publication of "The Reflector."

As student editor, Goudelock was elected by the student body at Mississippi State University to serve in that capacity for one calendar year. Although he was editor at the time this lawsuit was begun, the Court is informed that Goudelock has since graduated, and presumably the position of editor is filled by another student at Mississippi State.

Dr. Giles is the president of Mississippi State University; and Meyers and Dudley, University employees connected with the communications department, act as faculty advisers to the student editor and staff of "The

Reflector."

It is the Court's understanding that the parties have stipulated that no prohibition was placed by the University officials upon Goudelock's acceptance of the advertisement, or that they sought to influence his decision in any manner. The plaintiffs rely on the proposition that when Giles, Meyers and Dudley did become aware of the refusal of Goudelock to run the ad, they acquiesced and tacitly consented to his personal decision.

During the course of pretrial discovery, it was developed that Anne DeBarry, the chairwoman of the Mississippi Gay Alliance at Starkville, wrote a letter to Dr. Jack Heblom, sociologist at Mississippi State University, dated February 18, 1974, which was only shortly prior to the institution of the present action. That letter reads as follows:

"Dear Jack:

"The Mississippi Gay Alliance met tonight to discuss and decide what to do about our advertisement in 'The Reflector,' bring suit against Goudelock and the University or settle with the administration out of court. To bring suit, in my opinion as well as our own ACLU lawyers, would mean a court order that would enable gay groups in Mississippi a sliding board in the future. The ad is really unimportant. It is being used as a tool to begin 'legal freedom' for gays in Mississippi. It's the new law, which is all important, because gays in this state will get nothing without Federal help."

Also produced in the course of discovery was another communication reading:

"When Mississippi Gay Alliance begain, we worked with the women's movement at Mississippi State. We had special nights where gay issues were discussed. We sponsored a gay

film on campus, wrote gay struggle articles for the paper, but no one knew who we were, much less cared. So the master plan came out. We decided to come on strong and let everyone know we were here. We deliberately created a lawsuit for publicity and power. Really, absurd, if you were one of the very few who knew the real story. The officers of the Mississippi Gay Alliance were, at best, only three people.

"We told everyone about Mississippi Gay Alliance, that it was a very large organization which had nothing to lose and plenty of time. So we submitted an ad for the gay center which is over my letters and my apartment. It contains a few gay books, a plaque over the fireplace that states, 'To say and believe that gay is good' and a telephone. Our ad, as was expected, was rejected by the editor, and we consequently filed suit, making head-

lines in the radio, newspaper and local TV news. Three people had everyone on campus saying, 'There's going to be a gay revolution here. It's those gay militants. They're a big group that's causing lots of trouble.' A lot of trouble? Actually, only two letters, a simple ad and a lawyer. Big deal."

On the basis of the foregoing facts, the three official defendants, Giles, Meyers and Dudley, are now moving to dismiss the action. Although Goudelock, the editor, has not joined in the present motion, he has nevertheless set up in his answer as a defense that there is no claim upon which relief can be granted to plaintiffs.

The Court notes that there are four questions presented in today's hearing:

First, the issue of standing arising out of the fact that neither plaintiffs nor the Mississippi Gay Alliance have any connection,

as such, with the Mississippi State University and the absence of injury to them as the consequence of actions of the official defendants, who did absolutely nothing other than tacitly agree with Goudelock's decision not to accept the advertisement tendered by the Gay Alliance.

The second issue concerns a party's coming into Court with unclean hands in that defendants assert the letters referred to represent a blatant effort to use the courts for publicity purposes rather than to vindicate rights or grievances which actually exist.

The third proposition argued by Giles, Meyers, and Dudley is that these defendants are not suable because under the admitted facts there is no state action here involved.

And finally, that the case really concerns First Amendment rights exercisable by students who operate campus newspapers, for which

plaintiffs have no cause of action.

In addressing these issues, the Court need not decide the first two questions. As regards the clean hands doctrine, a party who comes into court guilty of inequitable conduct can hardly expect to obtain equitable relief. The equitable relief sought here would be to order the publication of the Gay Alliance advertisement. Legal relief also sought is the assessment of money damages against defendants. But this is an issue that the Court does not reach, although the motive for bringing this lawsuit on the part of the Mississippi Gay Alliance people does certainly concern this Court.

With respect to the standing question, the plaintiffs say that they have First Amendment rights to express themselves any way they may choose, to convey information that would be of aid to homosexuals, other such

persons, to have free communication of ideas, to advertise their association as such, and to promote public interest in the affairs of this organization. Although concerned about plaintiffs' standing, the Court assumes that it does exist, and proceeds to the other two issues which are dispositive of the case.

First, on the stipulated facts before the Court, and treating the complaint as admitted throughout, there is no action shown on the part of Giles, Meyers or Dudley, University officials, which brought about the circumstances of which the plaintiffs complain. The only allegation against these officials is that they tacitly went along with the decision of the campus newspaper editor. There is no allegation or proof that they directed Goudelock not to run the advertisement, or that they censored him in any way, or that they undertook to control or sought to control

his judgment in any manner whatsoever. Thus there was an utter lack of control or direction alleged or shown on the part of these three University officials. Their inaction can in no way be subject to Fourteenth Amendment principles.

Moreover, the undisputed facts are that "The Reflector" is a campus newspaper, and not an official university news organization as such; and it is operated by a student editor selected by vote of the student body. This Court is thus unable to see any connection between the operation of this newspaper, which is a student activity, and the State of Mississippi or any organ or agency of the State. The newspaper is simply a student activity conducted on the campus of a state university, and does not constitute state action in any accepted sense of the term.

The Court notes that the plaintiffs are

here complaining of an invasion of their First Amendment rights. Yet, they seek to have those rights established at the cost of competing First Amendment rights, which are important and well established in law. This Court does not embark on any new ground to declare what those competing First Amendment rights are, for they are well established in Federal decisions dealing with the freedom of the press.

In the Bazaar vs. Fortune case, when the Fifth Circuit had occasion to affirm this Court, those First Amendment rights were elucidated at length. There, the student director of "Images," a literary magazine published on the Ole Miss campus with some school money and University press facilities, was held to be a Constitutionally protected activity and that the University chancellor had no power to censor what might go into the magazine.

It was ruled that the chancellor had no power to hold up a particular edition of "Images" on the ground that it contained material that was in bad taste, was inappropriate, or that it would reflect upon the university, since the magazine had some four-letter words, and other phrases not used in polite society, yet not being obscene. There was no right of censorship held by the University.

The Fifth Circuit said: "It seems a well-established rule that once a university recognizes a student activity which has the elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment Constitutional guarantees."

The Court also said: "Neither can a state university support a campus publication and then try to restrict what it may publish, even if only to require that materials be

submitted to a faculty board to determine whether it complies with reasonable freedom of the press."

The Fourth Circuit, in Joyner vs. Whiting, 477 Fed.2d 456, made similar expressions, in point here. Usually these cases arise in the context of student editors wanting to print material deemed offensive to the college officials. Here, we have a student editor who declines to run material that is tendered to him, and the claim, as we understand it, is that because "The Reflector" is a campus newspaper, it becomes a state action, the newspaper is stripped of its protected First Amendment rights.

In the Fourth Circuit case, the Court cited Healy vs. James, a United States Supreme Court case, on the proposition that a college acting as the instrumentality of the state may not restrict speech simply because it

finds the views expressed by any group to be abhorrent. Now, this is the application made to protect the First Amendment rights of those who run the campus newspaper.

"The principles reaffirmed in Healy have been extensively applied to strike down every form of censorship of student publications at state-supported institutions. Censorship of Constitutionally-protected expression cannot be imposed by suspending the editor, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse."

It is quite clear from these cases that First Amendment rights of student editors of campus newspapers are as good, and as solid and as safeguarded as are the rights of other

newspapers.

What is the right, then, of a newspaper? The idea that a newspaper is like a public utility, that it must serve all comers if it serves any, has been completely rejected. All the cases that discuss freedom of the press were recently canvassed by the Supreme Court in the case of Miami Herald Publishing Company vs. Tornillo, 41 L.Ed.2d 730, decided only this year. There, the Court stated, in pertinent parts:

"We see that beginning with Associated Press, supra, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which '"reason" tells them should not be published' is unconstitutional.

A reasonable press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and, like many other virtues, it cannot be legislated."

Quoting further, "A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials -- whether fair or unfair -- constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

So from these authorities it is clear to this Court that Bill Goudelock, editor of "The Reflector," was engaged in a First Amend-

ment-protected activity, that he was operating a campus newspaper which enjoyed freedom of press and that in editing "The Reflector," he had the right to exercise his editorial judgment, to accept or to reject such material as he saw fit.

It is certainly true that this ad tendered by Anne DeBarry appears quite innocuous on its face. It certainly would not be such matter that might be regarded as obscene or, in the eyes of many people, offensive. But, for his own reasons, Goudelock, the student editor, refused to publish the ad in his newspaper. As I read these cases, he had the undoubted right to exercise an editorial judgment on what to put in and what not to put in the paper. That is a freedom that belongs to the press of America. How they exercise that right is up to those who publish printed material, free of judicial control.

The First Amendment protects them specifically in their decision-making about what to print. For this Court to order that any particular publication be run in a newspaper like "The Reflector" would be overriding the Constitutionally-protected freedom of the press.

For these reasons, it is perfectly clear that the defendants' motion to dismiss should be sustained. Moreover, the Court, of its own motion, notes that the remaining defendant, Bill Goudelock, at the time of this action, editor of "The Reflector," is not liable to plaintiffs as a matter of law. The Court will dismiss the action finally with prejudice.

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MISSISSIPPI GAY ALLIANCE and Anne DeBary, Plaintiffs-Appellants,

v.

Bill GOUDELOCK et al., Defendants-Appellees.

No. 74-4035.

United States Court of Appeals, Fifth Circuit.

Aug. 12, 1976.

Off-campus homosexual group brought action against state university student newspaper editor and others to compel publishing of a proposed paid advertisement in student newspaper. The United States District Court for the Northern District of Mississippi, at Oxford, William C. Keady, Chief Judge, entered judgment denying relief and the plaintiff appealed. The Court of Appeals, Coleman, Circuit Judge, held that where students elected editor and university officials did not supervise or control what was to be published or not published, First Amendment interdicted judicial interference with the editorial decision not to accept proposed advertisement.

Affirmed.

Goldberg, Circuit Judge, filed a dissenting opinion.

1. Constitutional Law ⇐90.1(8)

Choice of material to go into newspaper constitutes exercise of editorial control and judgment, and governmental regulation of this crucial process cannot be exercised consistent with the First Amendment guarantees of free press as they have evolved to this time. U.S.C.A. Const. Amend. 1.

2. Constitutional Law ⇐90.1(8)

Although university student newspaper was supported in part by activity fees collected by state university where students elected editor and university officials did not supervise or control what was to be published or not published in newspaper, First Amendment interdicted any judicial interference with decision of editor not to accept for publication proposed paid advertisement from off-campus group of homosexuals. U.S.C.A. Const. Amend. 1; 42 U.S.C.A. § 1983; Code Miss.1972, § 97-29-59.

3. Sodomy ⇐1

Mississippi statute condemning any intercourse which is unnatural, detestable and abominable, including acts committed per anus or per os, is not unconstitutional. U.S.C.A.Const. Amend. 1.

4. Sodomy ⇐1

One may not be prosecuted for being a homosexual but he may be prosecuted for commission of homosexual acts. U.S.C.A.Const. Amend. 1; 42 U.S.C.A. § 1983; Code Miss.1972, § 97-29-59.

Appeal from the United States District Court for the Northern District of Mississippi.

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

COLEMAN, Circuit Judge.

This is not the ordinarily encountered First Amendment case in which a university student newspaper seeks to set aside an order directing it *not* to publish something which it wishes to publish.

To the contrary, it is a case in which a nebulous group, the Mississippi Gay Alliance, representing itself to be an association "basically comprised of homosexuals", seeks judicial compulsion against a student newspaper requiring publication

of an advertisement which that paper does not want to publish.

The District Court refused to command publication. We affirm.

On August 16, 1973, a female, the self-styled chairwoman of the Mississippi Gay Alliance, presented a proposed paid advertisement to *The Reflector*, the student newspaper at Mississippi State University.

The proposed advertisement read as follows:

> "Gay Center — open 6:00 to 9:00 Monday, Wednesday and Friday nights.
>
> "We offer — counselling, *legal aid* and a library of homosexual literature. (Emphasis added).
>
> "Write to — The Mississippi Gay Alliance P. O. Box 1328 Mississippi State University, Ms. 39762."

The editor of the student newspaper refused to accept the tendered paid advertisement.

On February 8, 1974, the same person presented an announcement to be printed in the "briefs" section of *The Reflector*. This, too, was rejected. The content of that announcement does not appear in the record.

Whereupon, suit was filed against the editor and others, alleging that the refusal to print the paid advertisement and announcement deprived the Gay Alliance of its First Amendment rights and praying that the defendants be ordered to print the rejected material. The suit also sought an order requiring defendants to print future advertisements and announcements tendered by the Gay Alliance. Actual and punitive damages were also demanded.

The parties agreed to stipulations, which might be summarized as follows:

1. The named plaintiffs are not MSU students nor is the MGA a recognized student organization.
2. No member of the MGA was enrolled as an MSU student.

   [This second stipulation was, at plaintiff's request, modified by court order in December, 1974, after the district court's ruling was issued. The new stipulation apparently says that some members of the MGA were MSU students. This modification did not affect the ruling of the district court].
3. The MSU student body elected Bill Goudelock as editor of *The Reflector*.
4. Funds supporting *The Reflector* are derived at least in part from a non-waivable fee charged to students at MSU.
5. [University officials] Giles, Meyer, and Dudley did not give Goudelock any instructions not to accept the proffered material.

The trial court reviewed these facts, and determined that there were four issues in the case: (1) whether plaintiffs had standing to sue; (2) whether plaintiffs' unclean hands precluded the possibility of the court granting them the equitable relief they sought; (3) whether there was state action on the part of the defendant to support this § 1983 action; and (4) whether the First Amendment protection that covers a student newspaper meant that plaintiffs had no cause of action against Goudelock.

Deciding nothing with reference to the first two points, the District Court found, on the complaint and the stipulated facts, that there was no *indication* that any University official or faculty member had anything to do with the rejection of the advertisement or the an-

nouncement; that there was a complete lack of control over the student newspaper on the part of University officials.

The Court concluded that the rejection of the advertisement "does not constitute state action in any sense of the term".

Relying on *Bazaar v. Fortune*, 5 Cir., 1973, 476 F.2d 570, affirmed as modified, 489 F.2d 225 (en banc) and *Miami Herald Publishing Company v. Tornillo*, 1974, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730, it was held that in the absence of state action the student newspaper editor could "accept or reject such material as he saw fit".

While it is true that the student newspaper is supported, in part, by activity fees collected by the University, the students elect the editor. The complaint did not allege and the stipulations did not assert that University officials supervise or control what is to be published or not published in the newspaper.

As a matter of fact, in the context of the matter before us, this Court has held that the University authorities could not have ordered the newspaper not to publish the Gay Alliance advertisement, had it chosen to do so, see *Bazaar v. Fortune*, *supra*.

[1] In *Miami Herald Publishing Company v. Tornillo*, *supra*, the Supreme Court flatly declared:

> "The choice of material to go into a newspaper * * * constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

[2] Since there is not the slightest whisper that the University authorities had anything to do with the rejection of this material offered by this off-campus cell of homosexuals, since such officials could not lawfully have done so, and since the record really suggests nothing but discretion exercised by an editor chosen by the student body, we think the First Amendment interdicts judicial interference with the editorial decision.

There are special reasons for holding that there was no abuse of discretion by the editor of *The Reflector*.

Hutchinson's Mississippi Code of 1848 included the following provision:

> "Unnatural Intercourse; Punishment.
>
> "Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years." [1]

The exact language of this provision has been retained in the Code revisions of 1857, 1871, 1880, 1892, 1906, 1917, 1930, 1942, and 1972.[2]

The Mississippi statute condemns any intercourse which is unnatural, detestable and abominable, including acts committed per anus or per os, *State v. Davis*, 223 Miss. 862, 79 So.2d 452 (1955). This is not surprising. The very title of the statute shows it to have been directed against "Unnatural Intercourse".

1. Chapter 64, Art. 12, Title 7(20).

2. The current statute is Section 97-29-59, Mississippi Code of 1972. For mention of the significance to be attached to the ancient origin of a similar statute in Virginia, see *Doe v. Commonwealth*, 403 F.Supp. 1199, 1202, 1203 (E.D.Va., 1975), Affirmed, — U.S. —, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), [44 U.S.L.W. 3543].

The statute is not unconstitutional, *State v. Mays*, 329 So.2d 65 (Miss.1976).[3]

[3, 4] The editor of *The Reflector* had a right to take the position that the newspaper would not be involved, even peripherally, with this off-campus homosexually-related activity.[4]

The judgment of the District Court is AFFIRMED.

GOLDBERG, Circuit Judge (dissenting):

I respectfully dissent.

I understand the trial court and the majority of this panel to hold that the lack of direct involvement by university officials and the free expression rights of student editors combine to preclude any possible right of access to the *Reflector* on the part of the MGA. I disagree with that holding and, on the allegations, would find a narrowly circumscribed right of access which might extent to the MGA in this case.

The majority opinion here can be read as also deciding, in an alternative holding, that the advertisement tendered by the MGA was undeserving of any first amendment protection which might otherwise exist, because the ad might have "involved" the newspaper "with . . off-campus homosexually-related activity." This latter holding, if indeed it is that, is clearly and absolutely wrong.

A proper disposition of this case requires that we balance the rights of speakers and hearers of "protected" speech against special considerations supporting student control over student publications. In order that my position on the narrow but important first amendment issues in this case might be fully understood, I find it necessary at this juncture to summarize briefly the course of this litigation. After reviewing the background, I will discuss what I consider to be an easy issue—whether the MGA advertisement is "protected" speech. Finally, I will attempt to explain why I would reconcile the competing first amendment interests in a different fashion than did the trial court.

I. FACTS AND PROCEDURAL BACKGROUND

In August, 1973, the Mississippi Gay Alliance (MGA),[1] through one of its officers, submitted the following paid advertisement to be placed in the *Reflector*, the student newspaper at Mississippi State University (MSU):

3. The Mississippi Supreme Court relied on the decision of the Supreme Court of the United States in *Rose v. Locke*, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). In *Rose*, a Tennessee statute prohibited "Crimes against nature, either with mankind or any beast". The Supreme Court, reversing the Sixth Circuit, held that interpreting the Tennessee statute to include cunnilingus did not render it unconstitutional. It cited, 96 S.Ct. at 245, *State v. Crawford*, 478 S.W.2d 314 (Mo.1972), which held that crime against nature embraces within its terms acts of sodomy, bestiality, buggery, fellatio, and cunnilingus.

4. One may not be prosecuted for being a homosexual, but he may be prosecuted for the commission of homosexual acts. Taking into consideration the laws of Mississippi on the subject, speaking as only one member of the panel, Judge Coleman is of the opinion that *no* newspaper in the State may be required to advertise solicitations for homosexual contacts, any more than a paper could be expected to advertise solicitations for contacts with prostitutes. The advertisement tendered by the Gay Alliance offered *legal aid*. Such an offer is open to various interpretations, one of which is that criminal activity is contemplated, necessitating the aid of counsel.

1. The complaint described the MGA as follows: The MGA is an association located in Starkville, Mississippi. Some of its members attend Mississippi State University. The purpose of the MGA is to provide a forum where

"Gay Center — open 6:00 to 9:00 Monday, Wednesday and Friday nights.

"We offer — counselling, legal aid and a library of homosexual literature.

"Write to — The Mississippi Gay Alliance
P. O. Box 1328
Mississippi State University,
Ms. 39762."

Bill Goudelock, then the student editor of the paper, refused to accept the tendered advertisement. According to the plaintiffs' allegations, *The Reflector* at that time printed paid and unpaid advertisements of commercial, political, social, religious and informative natures.

In February, 1974, the MGA presented an announcement (the contents of which are not in the record) to the *Reflector*, asking that it be placed in the "Briefs" section, wherein the paper regularly ran announcements of campus and local organizations free of charge. This was never printed. In March, 1974, the MGA and individual members of the MGA filed the instant suit, seeking to compel publication of their ads, and to obtain declaratory relief and damages. In addition to Goudelock the following were named as defendants: Henry F. Meyers, Faculty Adviser to the student paper; Sam Dudley, Chairman of the MSU communications department; and William L. Giles, President of MSU. After limited discovery by both sides, the three MSU defendants moved to dismiss on the grounds that plaintiffs lacked standing to sue, had acted in bad faith, and had unclean hands.

At a hearing on this motion, the trial court proposed a set of stipulated facts. After some negotiation, the parties agreed to the stipulations which are summarized in the majority opinion. As indicated in that opinion, the district court did not decide the issues of standing[2] and unclean hands.[3] Rather, the trial court dismissed the action on the grounds now adopted by the panel here.

ideas may be discussed, information disseminated, and members freely associate between themselves and their friends. The MGA membership is composed primarily of homosexuals.

2. The trial court considered standing to be an issue but pretermitted it to reach the substantive issues. In their brief, the MSU defendants-appellees argue standing at length, urging that because the MSU officials caused plaintiffs no direct injury, *i. e.*, because the officials were passive, plaintiffs do not have standing to sue these officials. This argument is unpersuasive. Plaintiffs have alleged a distinct injury (their ad was rejected) and have alleged a causal relationship between the action of Goudelock, the acquiescence of the MSU officials, and that injury. The most recent cases seem to treat standing as a preliminary determination looking to objective factors: Has plaintiff alleged 1) an injury which sets him apart from other interested citizens, and 2) some degree of responsibility on the part of the defendant for that injury? The purpose of this exercise is simply to assure the court that it will have a sincere contest—an actual "case or controversy"—and will not be called upon to render advisory opinions. *See generally Korioth v. Briscoe*, 5 Cir. 1975, 523 F.2d 1271. Plaintiffs' allegations here are sufficient to support their standing—whether they have stated a cause of action is another question.

3. Although the trial judge explicitly avoided reaching the issue, he did quote at length from letters written by plaintiff DeBary, and indicated a concern with the cleanliness *vel non* of the plaintiffs' hands. In one letter DeBary stated, *inter alia*, "the ad is really unimportant. It is being used as a tool to begin 'legal freedom' for gays in Mississippi." In another communication, DeBary stated, "we deliberately created a lawsuit for publicity and power. Really absurd, if you were one of the very few who knew the real story. The officers of the MGA were, at best, only three people."

As a general rule, the determination of whether the "unclean hands" maxim should be applied to bar relief in a specific case is left in the first instance to the trial court. *See, e. g., United States v. Second Nat'l Bank of Miami*, 5 Cir. 1974, 502 F.2d 535; *Wolf v. Frank*, 5 Cir. 1973, 477 F.2d 467, *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218. Although it would thus be appropriate to leave this question to the trial court on remand, I feel constrained to note that the situation before us seems an unlikely one for the applicability of this equitable defense.

Claimants in equity who practice fraud, deceit, or the like, even if not to a degree sufficient to be held criminally or civilly liable, may in some situations properly be denied equitable relief. *See generally Munchak v. Cunningham*, 4 Cir. 1972, 457 F.2d 721; *Washington Capitols Basketball Club, Inc. v. Barry*, 9 Cir. 1969, 419 F.2d 472.

In determining the appropriate standard of review in this case, it should be noted that the exact nature of the procedural disposition by the lower court is uncertain. The ruling seems to say that no cause of action was stated, which would indicate dismissal under Fed.R. Civ.P. 12(b)6. On the other hand, the trial court's reliance on the stipulated facts suggests that the motion to dismiss was being treated as one for summary judgment (Rule 56 via Rule 12).

The MGA argues that if the latter analysis is accurate, the trial court erred in failing to follow the procedures set out in Rule 12 for converting the motion—the nonmoving party must be given a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." If the district court's view of the law is correct, however, the plaintiffs in effect had their "reasonable opportunity"—no material they could have presented could have changed the legal effect of the stipulated facts.

I think that it would be most appropriate to treat the disposition below as a summary judgment. The major issues before this court could then be stated as follows: 1) does there exist in any circumstances a constitutional right of access to the advertising and announcement sections of student newspapers at state universities? 2) If so, are there any factual questions in this case which, if resolved in favor of the plaintiffs, could lead to the conclusion that the plaintiffs were within the scope of such a right? If both questions are answered affirmatively, then summary judgment was improper, and, *a fortiori*, disposition under Rule 12(b)(6) would have been improper.

Before discussing those major issues, however, I will address the issue raised for the first time in the majority's apparent alternative holding—whether the MGA ad is "protected" speech.

II. PROTECTED SPEECH

As I have indicated, the majority's discussion of "special reasons" justifying the student editor's refusal to accept this ad can be read as an implicit holding that the MGA ad was "unprotected"

In this case, however, the evidence shows only that DeBary hoped to get some publicity from the suit and that she did not consider the nominal issue—whether the *Reflector* had the right to refuse her ad—as the overriding concern. No cases have been cited in which a claimant has been held to have "unclean hands" simply because she hoped that her suit would publicize a cause. I expect that much civil rights litigation might have been thwarted had such a rule been applied. The law is full of "test" cases which have determined important constitutional matters in seemingly minor disputes. I seriously doubt that the DeBary letters could justify a refusal to grant equitable relief on the basis of unclean hands.

speech for first amendment purposes. Such a holding obviously would be fallacious. If other local groups had a right of access to the *Reflector*, that right could not be denied the MGA in respect to the advertisement at issue here. The ad directly solicits nothing approaching criminal activity, and the publication of the ad would not involve the *Reflector*, "even peripherally," in the proscribed activities discussed in the majority opinion.

The advertisement simply sought to notify persons who were homosexuals, who were interested in the subject of homosexuality or who had problems relating to homosexuality that certain services were available to them at a "gay center." No statute, in Mississippi or in any relevant jurisdiction, makes criminal the status of being a homosexual.[4] Indeed, no statute could do that and survive constitutional challenge. *See Robinson v. California*, 1962, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758. On the face of it, none of the services listed in the advertisement could conceivably be characterized as illegal. The suggestion of Judge Coleman that the criminal taint in the ad is demonstrated by the offer of "legal aid" implies a presumption of illegality whenever lawyers are involved[5]—surely the level of respect for the profession has not reached this nadir.

Thus, the exception whereby statements which propose illegal transactions are rendered valueless for first amendment purposes cannot be applied to this advertisement.[6] Neither could the advertisement even arguably be characterized as "unprotected" speech on any other ground. It is not "directed to inciting or producing imminent lawless action."[7] The ad could occasion no substantial disruption of classroom activity,[8] nor could

4. *Doe v. Commonwealth*, E.D.Va.1975, 403 F.Supp. 1199 *aff'd*, 1976, — U.S. —, 96 S.Ct. 1489, 47 L.Ed.2d 751, and *Rose v. Locke*, 1975, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185, relied on by the majority, dealt of course with proscribed acts (Rose, in fact, dealt with heterosexual acts). *Cf. Gay Students Organization v. Bonner*, 1 Cir. 1974, 509 F.2d 652; *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, D.R.I. 1976, — F.Supp. — [44 L.W. 2577, June 9, 1976]. *But cf. Gay Lib v. University of Missouri*, W.D.Mo.1976, — F.Supp. — [45 L.W. 2051, June 29, 1976].

5. *See* note 4 of the majority opinion.

6. *Compare Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 1973, 413 U.S. 376, 384–86, 93 S.Ct. 2553, 37 L.Ed.2d 669 *and United States v. Hunter*, 4 Cir. 1972, 459 F.2d 205, *cert. denied*, 409 U.S. 934, 93 S.Ct. 235, 34 L.Ed.2d 189 *with Bigelow v. Virginia*, 1975, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 *and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 1976, — U.S. —, 96 S.Ct. 1817, 48 L.Ed.2d 346.

Had the tendered ad expressly solicited "unnatural intercourse," or had the editor of the *Reflector* grounded his refusal to publish the ad on his knowledge that the "library of homosexual literature" contained obscene materials, I might well reach a different conclusion. Plainly, neither of these situations has been shown to exist in the case before us, so I remain convinced that the tendered advertisement should be accorded full first amendment protection.

7. *Brandenburg v. Ohio*, 1969, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (per curiam):

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

For an argument that the *Brandenburg* test should be applied to cases involving noncriminal sanctions, see Comment "Brandenburg: A Test For All Seasons?" 43 *U.Chi.L.Rev.* 151, 165–91 (1975).

8. *Tinker v. Des Moines Indep. School Dist.*, 1969, 393 U.S. 503, 513, 89 S.Ct. 733, 740, 21 L.Ed.2d 731, suggests that student conduct in

it be construed as an "intolerable" invasion of a "substantial" privacy interest.[9] No basis exists for suggesting that the ad is libelous,[10] obscene[11] or "fighting words."[12] In short, nothing in the record contradicts the following statement of the trial court:

> It is certainly true that this ad tendered by Anne DeBary appears quite innocuous on its face. It certainly would not be such matter that might be regarded as obscene, or, in the eyes of many people, offensive.[13]

The ad carried an informative statement with regard to a matter of social concern, and, as seen, its contents trigger none of the recognized exceptions to freedom of speech.

Thus, this is not an "unnatural intercourse" case, and there exist no "special reasons" related to the content of the ad which would justify its discriminatory

a high school that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Compare Blackwell v. Issaquena Co. Bd. of Educ.*, 5 Cir. 1966, 363 F.2d 749 *with Burnside v. Byars*, 5 Cir. 1966, 363 F.2d 744, 749.

> The tradition of academic freedom and the greater maturity of students on a college campus suggest that courts should be particularly solicitous of first amendment rights in such a setting. The Supreme Court has made it clear, for example, that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Board of Curators of University of Missouri*, 1973, 410 U.S. 667, 670, 93 S.Ct. 1197, 1199, 35 L.Ed.2d 618; *see also Healy v. James*, 1972, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266. *But see Gay Lib v. University of Missouri*, W.D.Mo.1976, — F.Supp. — [45 L.W. 2021, 1976] (a case which, in my opinion, cannot be reconciled with *Healy*).

9. *See Erznoznik v. City of Jacksonville*, 1975, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125; *Cohen v. California*, 1971, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284. Justice Stewart's description of the motion pictures at issue in *Young v. American Mini Theatres*, 1976, — U.S. —, —, 96 S.Ct. 2440, 48 L.Ed.2d — [44 U.S.L.W. 4999, 1976 (dissenting opinion), is obviously applicable to the MGA ad:

> The kind of expression at issue here is no doubt objectionable to some, but that fact does not diminish its protected status any more than did the particular content of the "offensive" expression in *Erznoznik* . . . (display of nudity on a drive-in movie screen); *Lewis v. City of New Orleans*, 415 U.S. 130 [94 S.Ct. 970, 39 L.Ed.2d 214] (utterance of vulgar epithet); *Hess v. Indiana*, 414 U.S. 105 [94 S.Ct. 326, 38 L.Ed.2d 303] (utterance of vulgar remark); *Papish* . . . (indecent remarks in campus newspaper); *Cohen* . . . (wearing of clothing inscribed with a vulgar remark); *Brandenburg* . . . (utterance of racial slurs); or *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 [79 S.Ct. 1362, 3 L.Ed.2d 1512] (alluring portrayal of adultery as proper behavior).

10. "[T]here is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 1974, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789; 805; *cf. New York Times v. Sullivan*, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686.

11. *See Miller v. California*, 1973, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419; *Roth v. United States*, 1957, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. *Cf. Young v. American Mini Theatres, Inc.*, — U.S. —, 96 S.Ct. 2440, 48 L.Ed.2d — [44 U.S.L.W. 4999, 1976], discussed *infra* at note [24]; *Ginsberg v. New York*, 1968, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (upholding conviction for selling to minor magazines which were concededly not "obscene" if shown to adults).

12. Communications "which by their very utterance inflict injury" are constitutionally unprotected. *Chaplinsky v. New Hampshire*, 1942, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031.

13. I assume that the majority implicitly has held this finding by the trial court to be clearly erroneous.

rejection in the face of a general right of nondiscriminatory access. I turn, then, to the difficult first amendment questions actually presented in this case.

III. A CONSTITUTIONAL RIGHT OF ACCESS

The MGA's argument that it had a right of access to the advertising columns of the *Reflector* is based on the notion that when the state provides a communication forum generally open to the public, the state may not discriminatorily forbid the use of the forum by certain individuals because of the content of their proposed messages. After discussing the contours of this "public forum" doctrine as it might be applied to a state newspaper, I will address two separate questions which the trial court and the majority have commingled: 1) should the *Reflector* be viewed as a state newspaper?; 2) assuming that the *Reflector* engages in state action, do the free expression rights guaranteed to student editors preclude any right of access on the part of outside groups? As will be seen, I conclude that, on the basis of the allegations, the advertising and announcement sections of the *Reflector* can be seen as a public forum to which the MGA might have a right of nondiscriminatory access.

A. *Equal Access: State Newspapers as Public Forums.*

There is authority for the proposition that the first amendment's guarantee of free speech carries with it some requirement that the state provide "minimum access"—that is, that the state accommodate speakers' attempts to obtain access to listeners.[14] Freedom of association, as well as freedom of speech, supports such a requirement in some situations.[15]

14. *See* Kalven, "The Concept of the Public Forum: *Cox v. Louisiana*," 1965 *Sup.Ct.Rev.* 1; Note, "The Public Forum: Minimum Access, Equal Access, and the First Amendment," 28 *Stan.L.Rev.* 117 (1975). For an example of a court's adoption and use of the minimum access view in the context of a nontraditional public forum, see *Albany Welfare Rights Organization v. Wyman*, 2 Cir. 1974, 493 F.2d 1319, *cert. denied*, 1976, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 64 (absolute ban on leafleting in welfare office waiting room was unconstitutional abridgment of free speech).

15. There is right of the listener to protected speech that, in this case, coincides with the associational rights of some students. MGA asserts that some of its members are MSU students, and the amended stipulation apparently supports this. There may be other MSU students who are interested in attending MGA meetings or using MGA facilities. These and other readers of the *Reflector* have been denied information that may have been necessary or important to the full exercise of their first amendment rights freely to associate with others. It is not sufficient to suggest that other means of communicating the existence of their organization or the time and place of their meetings remain with the MGA, for the *Reflector* may be the cheapest, easiest, and most effective means of communicating with a specific audience. Particularly on a matter as personal as sexual preference, the reader may wish to preserve his or her anonymity, and his or her receipt of a widely distributed school paper may serve this need better than, say, attendance at an MGA speech on campus.

The guarantee to those interested in homosexuality of the right freely to associate with one another would be a hollow promise indeed unless they are also assured of equal, nondiscriminatory access to information relevant to their concerns. "[T]he central First Amendment concern remains the need to maintain free access of the public to the expression." *Young v. American Mini Theatres, Inc.*, 1976, — U.S. ——, ——, 96 S.Ct. 2440, 2455, 48 L.Ed.2d —— [44 U.S.L.W. 4999, 5007, 1976] (Powell, J., concurring). "[T]his Court has referred to a First Amendment right to 'receive information and ideas, '. . . [F]reedom of speech '"necessarily protects the right to receive."'" *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 1976, — U.S. ——, ——, 96 S.Ct. 1817, 1823, 48 L.Ed.2d 346, 355.

Whatever the scope of the minimum access requirements of free speech, a narrower doctrine is well established in Supreme Court precedent—when the state has provided a public forum through which speakers might have access to listeners, the state cannot discriminate among potential speakers on the basis of the content of their message.[16] The notion that there must be equality of access to public forums is compelled not only by speech and associational rights, but also by the full force of the equal protection clause.

The Supreme Court expounded on equal access in *Police Dep't of Chicago v. Mosley*, 1972, 408 U.S. 92, 95–96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212:

> . . . [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." . .
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone and may not be justified by reference to content alone.
>
> [Citations and footnote omitted.]

The state, of course, has considerable discretion in reasonably regulating the time, place and manner in which speech may be made from various public forums.[17] What the state cannot do is to provide a forum through which some members of the public are able effectively to communicate their message to a certain audience while other members of the public are prohibited from utilizing

16. *See Police Dept. of Chicago v. Mosley*, 1972, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, and cases there cited; *Southeastern Promotions, Ltd. v. City of West Palm Beach*, 5 Cir. 1972, 457 F.2d 1016. *See also Karst*, "Equality as a Central Principle in the First Amendment," 43 *U.Chi.L.Rev.* 20 (1975); *Kalven, supra* note 14; Stone, "Fora Americana: Speech in Public Places," 1974 *Sup.Ct.Rev.* 233; Note, *supra* note 14. First amendment protections, of course, are fully applicable against the states through the due process clause of the fourteenth amendment. *See, e. g., Bigelow v. Virginia*, 1975, 421 U.S. 809, 811, 95 S.Ct. 2222, 44 L.Ed.2d 600.

17. *See, e. g., Grayned v. City of Rockford*, 1972, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222, 232; *Kovacs v. Cooper*, 1949, 336 U.S. 77, 85–87, 69 S.Ct. 448, 452–454, 93 L.Ed. 513, 521–522.

the forum because of the content of their proposed messages.[18]

I take it to be quite clear, for example, that a city, having established a "speaker's corner" in a public park from which almost anyone might speak about almost anything, could not constitutionally prohibit speeches dealing non-obscenely with the topic of homosexuality.[19]

Taking the hypothetical a step closer to the instant case, we might posit a newspaper paid for and published by the state—call it the "Open Forum"—in which all citizens are invited to express their views on any issue, subject only to reasonable space limitations and a small fee to help offset printing costs. Could the "Open Forum" refuse to print a tendered statement on the ground that it expressed a political view contrary to that of the Governor, or on no stated ground at all? Surely not. Conceivably, the state could place many non-content-oriented restrictions on the form of the messages, but the state could not refuse tendered statements otherwise similar in form to those regularly accepted solely

18. The result in *Lehman v. City of Shaker Heights*, 1974, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770, seems to indicate a departure from the principle stated in text in that the court there upheld a city transit system's refusal to permit political advertising within its vehicles, despite the acceptance of commercial ads by the transit system. A plurality opinion, for various reasons related to a city's operation of a bus system, tested the ordinance under a weak "rational relationship" standard. Justice Douglas' critical fifth vote, however, was placed solely on a concern for the "captive audience" in the city vehicles and he vehemently rejected any justification for the city's policy based on the content of the advertising messages. *Id.* at 304–309, 94 S.Ct. at 2717–20, 41 L.Ed. at 777–780.

The author of the *Lehman* plurality opinion (Justice Blackmun) apparently now regards the case as having turned on the captive audience concern. *See Southeastern Promotions, Ltd. v. Conrad*, 1975, 420 U.S. 546, 555, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448. Indeed, speaking for a majority of the Court, Justice Blackmun has approved the *Lehman* dissenters' rejection of any simplistic distinction between commercial and political advertising for purposes of the First Amendment. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 1976, — U.S. —, — n.16, 96 S.Ct. 1817, 1824 n.16, 48 L.Ed.2d 346, 356 n.16.

Nothing in the case before us suggests any "captive audience" problem.

19. This seems axiomatic from *Mosley*. (The implication of the "special reasons" portion of the majority opinion in this case is that the statement of law in the text is far from being "quite clear." With respect, I can only submit again that I think the majority is clearly wrong.)

Part III of the plurality opinion in *Young v. American Mini Theatres, Inc.*, 1976, — U.S. —, —, 96 S.Ct. 2440, 48 L.Ed.2d — [44 U.S.L.W. 4999, 1976] suggests that *Mosley*'s statement on the prohibition of content discrimination should be read only in light of *Mosley*'s facts (involving an ordinance permitting labor picketing near a school but forbidding picketing on other issues). Justice Powell's fifth vote, however, was needed for the result in *Young* (upholding a zoning ordinance regulating locations of purveyors of "adult" but non-obscene materials), and he explicitly disapproved of Part III of the plurality opinion. Id. at —, n.1, 96 S.Ct. 2440 [44 U.S.L.W. at 5006 n.1]. The four dissenters apparently would read *Mosley* for all it seems to say. *Id.* — U.S. at — & n.2, 96 S.Ct. 2440 [44 U.S.L.W. at 5009 & n.2]. In these circumstances, I believe that for "equal access" purposes *Young* should be read as limited to the municipal zoning concerns expressed in Justice Powell's concurrence. ". . . [T]his situation is not analogous to cases involving expression in public forums or to those involving individual expression or, indeed, to any other prior case. . . ." Id. at —, 96 S.Ct. at 2455 [44 U.S.L.W. at 5007] (Powell, J., concurring).

because the proffered ads were disagreeable in content.[20]

The conclusion I reach with regard to the "Open Forum" hypothetical finds support in the case law. In a case with striking similarities to the one before us, the Seventh Circuit held that a state university's campus newspaper which was open to commercial and some political and service advertisements could not constitutionally reject, because of editorial content, advertisements describing the purposes of a university employees' union, an advertisement proclaiming the immorality of racial discrimination, or advertisements pertaining to race relations and the Vietnam War. *Lee v. Board of Regents*, 7 Cir. 1971, 441 F.2d 1257, *aff'g*, 306 F.Supp. 1097. Indeed, the only potentially important distinction between *Lee* and the instant case is that in *Lee*, it was "conceded that the campus newspaper is a state facility." 441 F.2d at 1258. The rules under which the tendered advertisements were rejected had been promulgated by a faculty-student committee. 306 F.Supp. at 1099.

In *Zucker v. Panitz*, S.D.N.Y.1969, 299 F.Supp. 102, the district court reviewed a claim by high school students seeking to publish in the high school newspaper paid advertisements opposing the Vietnam War. The court found that the newspaper was "a forum for the dissemination of ideas," noting that other articles on the war and the draft had been published in the paper and that the paper was open to the free expression of ideas in news and editorial columns and in letters to the editor. Relying on *Tinker v. Des Moines Indep. Comm'ty School Dist.*, 1969, 393 U.S. 503, 503 S.Ct. 733, 21 L.Ed.2d 731, the district court enjoined the school officials from interfering with the right of students in the high school to place advertisements in the school newspaper.

In *Radical Lawyers Caucus v. Pool*, W.D.Tex.1970, 324 F.Supp. 268, Judge Roberts held that the Texas Bar Journal, conceded to be an agency of the state of Texas, was prohibited by the first and fourteenth amendments from refusing to accept an advertisement publicizing an upcoming meeting of the plaintiff organization. The court disposed of the defendant's argument that the Journal be permitted to refuse "political and editorial" advertising so that it might "maintain its neutrality in controversial matters," by pointing to position-taking political statements that had appeared in the Journal. *Id.* at 270.

A "state" newspaper could not constitutionally refuse advertisements advocating one side of a public issue while accepting advertisements advocating the other side. No less offensive to the first and fourteenth amendments should be a case in which advertisements dealing with public issues are generally accepted, but advertisements on certain public issues are selectively and arbitrarily excluded.[21]

20. I will discuss in text *infra* the types of restrictions which might be permissible.

21. The Supreme Court has never passed on a claim of equal access to a state publication. The suggestion that the Court would recognize the rights found in *Lee*, *Zucker* and *Radical Lawyers* is not undermined by, and indeed receives implicit support from, *Columbia Broadcasting System v. Democratic National Committee*, 1973, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772. This complex case prompted six opinions, and its result—network broadcasters are not required to accept paid political advertising—must be seen as resting at least in part on a feeling that the private broadcasters were not the government for first amendment purposes.

Were the *Reflector* clearly a paper run by and for the state, then, the allegations of the MGA (unaltered by the stipulated facts) that the paper regularly accepted paid and unpaid messages and announcements from other local groups would be sufficient to raise a genuine issue of material fact. If the allegations were true, the state would have denied the MGA equal access to a public forum.

On the other hand, if the *Reflector* were purely a private newspaper, there presumably would exist no such right of access. The editor of a private newspaper is constitutionally protected in a decision not to publish a political reply advertisement, even in the face of a state right to reply statute. *See Miami Herald Publishing Co. v. Tornillo*, 1974, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730. Clearly, then, a federal court would have no power, under statutes requiring "state action," to prohibit a non-state newspaper from exercising selective content discrimination in its publication of advertisements.[22]

The first question thus becomes whether the *Reflector* can be characterized as the state. Even if, under traditional analysis, "state action" is found, the court must proceed to the further question of whether the newspaper is, at least in part, a public forum. That question will require a review of special considerations relating to student newspapers, and a balancing of competing first amendment interests.

B. *State Action.*

As indicated above, *Lee* and *Zucker* were not difficult cases with regard to the question of state action. It was clear in both that officials, not students, exercised ultimate responsibility for the censorship decision. Indeed, the student editors in *Zucker* were plaintiffs, seeking to compel publication of the advertisements. Although the students in *Lee* may have supported the official rules and the specific decision not to publish, it was conceded that the censorship was the product of state action. In this case, by contrast, the university officials argue that they do not and indeed could not countermand specific editorial decisions of the student editor of the *Reflector*, and thus that the "state action" required to trigger the public forum doctrine is lacking. The trial court and the majority here have agreed with this argument.

The absence of affirmative involvement by university officials in the decision to refuse the MGA ad should not end the state action inquiry. Were direct, active involvement by state officials to become a prerequisite for a state action finding, *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, and *Marsh v. Alabama*, 1946, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, would have to be overruled, and cases like *Hudgens v. N.L.R.B.*, 1976, —— U.S. ——, 96 S.Ct. 1029, 47 L.Ed.2d 196; *Moose Lodge No. 107 v. Irvis*, 1972, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627, and *Golden v. Biscayne Bay Yacht Club*, 5 Cir. 1976, 530 F.2d 16 (en banc) would be very easy cases. State action of course, is not so simple. A number of factors must be examined to determine if the action challenged as detrimental to individual rights should be considered to be state action for fourteenth amendment purposes. As Judge Coleman emphasized in *Golden*, the ultimate question is whether the facts establish "significant state involvement" in what otherwise may appear to be private activity. 530 F.2d at 19.

To my mind, the allegations of the MGA, if shown to be true, would establish that actions taken by the *Reflector*, as it deals with and appears to members of the public, should be considered to be state action. The complaint in this action set forth the following allegation:

> The Reflector is the official newspaper of MSU, a state supported and controlled institution of higher learning. The major portion of the Reflector's financing comes from the Student Activity Fund which is collected by MSU and disbursed to the Reflector. The Reflector is printed on MSU facilities and it is an organ of MSU.

Arguably, the Court alternatively reached the same result, 5–4, even under the assumption that the broadcasters were engaged in governmental action. This latter holding, I think, must be seen as narrowly limited to the unique characteristics of the regulated broadcast industry. *See Red Lion Broadcasting Co. v. FCC*, 1969, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371; Note, "The Supreme Court, 1972 Term," 87 *Harv.L.Rev.* 57, 175 (1973). Compare *Red Lion* with *Tornillo*, *supra* note 13. *See also Mink v. Radio Station WHAR*, 1976 [FCC No. 76–529, 44 L.W. 2584, June 8, 1976].

Several statements by individual Justices in *CBS* seem to indicate that if governmental action were found, full rights of equal access should apply. For example, the Chief Justice stated:

> Were we to read the First Amendment to spell out governmental action in the circumstances presented here, few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny.

412 U.S. at 120, 93 S.Ct. at 2095, 36 L.Ed.2d at 793.

Justice Douglas rejected the notion that the broadcasters engaged in governmental action. He speculated on the effect of a contrary finding as follows:

> If these cases involved [the Corporation for Public Broadcasting], we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper like the New York Times, Washington Post, and Sacramento Bee. The Government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired. For by the First Amendment it may not censor or enact or enforce any other "law" abridging freedom of the press. Politics, ideological slants, rightist or leftist tendencies could play no part in its design of programs . . . More specifically, the programs tendered by the respondents in the present cases could not then be turned down.

Id. at 149–50, 93 S.Ct. at 2109–10, 36 L.Ed.2d at 810.

As will be seen in my later discussion of the scope of the right to access, the scope of the right envisioned by Justice Douglas is broader than that which I would find in relation to student publications.

Justice Brennan, joined by Justice Marshall, dissented in *CBS*. They felt that broadcast licensees satisfied state-action criteria, and thus they would have applied the public forum doctrine:

> . . . [T]here can be no doubt that the broadcast frequencies allotted to the various radio and television licensees constitute appropriate "forums" for the discussion of controversial issues of public importance. Indeed, unlike the streets, parks, public libraries and other "forums" that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated *specifically* to communication. And, since the expression of ideas—whether political, commercial, musical or otherwise—is the exclusive purpose of the broadcast spectrum, it seems clear that the adoption of a limited scheme of editorial advertising would in no sense divert that spectrum from its intended use.

Id. at 194–95, 93 S.Ct. at 2132–33, 36 L.Ed.2d at 836.

22. *Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 1973, 413 U.S. 376, 391, 93 S.Ct. 2553, 2562, 37 L.Ed.2d 669, 680:

> [W]e affirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.

The stipulations included the fact that funds supporting *The Reflector* were derived from a non-waivable fee charged to students at MSU.

The *Reflector's* funding is thus derived from what is in effect a tax charged by the state to the students.[23] The allegations suggest that the imprimatur of the state is clearly stamped on the paper. In these circumstances, I have little doubt that this court would review a decision by the students to exclude blacks from participation on the newspaper staff as a decision imbued with state action.[24] To my mind, the pure "state action" question should be the same in the first amendment context. *Cf. Golden, supra*, 530 F.2d at 19.

Having concluded, on the issue of "state action," that appellants are deserving of at least a remand,[25] I turn to what I consider the most significant question in this case: does the Constitution permit student editors of an official publication at a state university to pursue a general policy of accepting from local groups advertisements dealing with matters of public interest, but at the same time to exclude, because of its content, a certain advertisement proffered by a similarly situated group?

C. *A Right to Edit.*

Clearly, student editors of a campus newspaper are protected by their own first amendment rights.[26] As the cases discussed below demonstrate, these rights include in some contexts the right to refuse to print as well as the right to print. The district court seems to have determined that these rights extend to provide complete student autonomy over all sections of the newspaper. Relying on this Circuit's decision in *Bazaar v. Fortune*,[27] and the Fourth Circuit's opinion in *Joyner v. Whiting*,[28] the trial judge concluded that student editor of *The Reflector* was protected in his decision to reject the MGA advertisement by the same protections which, in *Tornillo*, shielded the Miami Herald's decision not to run a reply to its editorial.

Bazaar held that, on the facts before it, state university officials could not

23. For a consideration of the relationship between the fund supporting a student newspaper and the state in a very different context (the eleventh amendment), see *Schiff v. Williams*, 5 Cir. 1975, 519 F.2d 257. *Cf. Smith v. Doehler Metal Furniture Co.*, 1943, 195 Miss. 538, 15 So.2d 421; *Coleman v. Whipple*, 1941, 191 Miss. 287, 2 So.2d 566.

24. *See* Karst, *supra* note 16, at 46–47 & n. 137. *Cf. Joyner v. Whiting*, 4 Cir. 1972, 477 F.2d 456, 462–63 (question discussed but not decided); *Zucker v. Panitz*, S.D.N.Y.1969, 299 F.Supp. 102, 105 n. 4:

> Different policy considerations govern whether a privately owned newspaper has affirmative duty to grant access to its pages, and whether a school newspaper has such a duty. For instance, there would be involved the thorny issue of finding state action, a problem which does not exist regarding a school newspaper.

25. The argument might be made that the stipulated funding arrangement in itself is enough upon which to base a state action finding. Appellants ask only for a remand on this issue, however. If facts were found on remand to establish publ. perception of the *Reflector* as the official campus newspaper, the state action determination could be made with more confidence.

26. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. School Dist.*, 1969, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737.

27. 1973, 476 F.2d 570, *aff'd. as modified*, 1974, 489 F.2d 225 (en banc).

28. 1973, 477 F.2d 456.

censor the contents of a student literary magazine. The court rejected the defendants' argument that, because the magazine was published with the advice of the university's English department, the magazine would be identified as speaking for the university, which gave the defendants a right to censor. Neither was censorship justified on the ground that four-letter words used in the objected to stories made them "too tasteless and inappropriate" to be connected with the university. Our *en banc* court modified *Bazaar* only by making explicit the university's right to print a disclaimer of official responsibility with the stories. 489 F.2d 225.[29]

Joyner held that a state university's withdrawal of financial support from the official newspaper, in response to the newspaper's segregationist editorial policy, abridged the freedom of press rights of the students. 477 F.2d at 460–62.[30]

These cases do not suggest that the *Reflector* should be thought of as something other than a state newspaper—indeed, they suggest the contrary. The rationale of *Bazaar* is expressly grounded on the "open forum" cases discussed in the preceding section. 476 F.2d at 575. Although *Joyner* invokes "freedom of the press", the result in that case is certainly consistent with public forum notions, and the *Joyner* court also relies on the open forum cases cited above. 477 F.2d at 460. *Bazaar* and *Joyner* indicate that state school officials, having provided a forum for free expression by students, cannot censor the content of the messages that the students seek to disseminate. That rule, on its face, would not be inconsistent with a requirement that the columns of the state-sponsored paper be open to anyone with anything to say. The *Joyner* court seemed to recognize this possibility:

> When a college paper receives a subsidy from the state, there are strong arguments for insisting that its columns be open to the expression of contrary views and that its publication enhance, not inhibit, free speech.

477 F.2d at 462.

In my opinion, however, a requirement of wide-open access to the pages of a student newspaper would sweep much too broadly. To the extent that the right of student editors to free expression is to be protected, that right must include the right to edit. With limited space for news and editorial columns, and with attribution on the masthead as "editors," students operating a student paper must necessarily exercise some discretion in choosing what to publish and what not to publish. This is most clear, perhaps, when the materials to be edited are generated solely by the student staff, but the "right to edit" (based in part on the necessity for editing) would logically extend to articles or columns submitted by outside sources.

This principle is supported by *Joyner's* reliance on a "freedom of the press" rationale, and by the Third Circuit's deci-

29. The dissent from the *en banc* court's decision stressed the narrowness of the issues presented in *Bazaar*—whether the university must appear to have sponsored the offending publication. The dissent also noted that the university had admitted that it could not censor the student newspaper. 489 F.2d at 226–28. *Cf. Schiff v. Williams*, 5 Cir. 1975, 519 F.2d 257, 263 (Gee, J., specially concurring) (the *Bazaar* panel's view of the law was "scarcely unprecedented.")

30. The college involved in *Joyner* was predominantly black, the student newspaper staff was all black, and the offending editorials were "black power" in tone.

sion in *Avins v. Rutgers, State University of New Jersey*, 3 Cir. 1967, 385 F.2d 151, *cert. denied*, 1968, 390 U.S. 920, 88 S.Ct. 855, 19 L.Ed.2d 982. *Rutgers* upheld the right of the student editors of a state university law review to reject a tendered article. The court stressed the impossibility and undesirability of a requirement that student editors publish every article submitted, and held that "the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment." 385 F.2d at 153. Both *Joyner* and *Rutgers* assumed without deciding that state action existed, but, nevertheless, *Joyner* held that the school officials could not censor the paper, and *Rutgers* held that an outside author could demand no right of access to the space allotted to outside articles.

I fully support the result in the *Rutgers* case and the implication it bears for a general right to edit on the part of students editors of state-supported publications. The question thus becomes one of competing first amendment interests, and the search must be for a reconciliation between the interests, on the one hand, of student autonomy in control over the contents of the newspaper, and, on the other, of nondiscriminatory public access to a communication forum sponsored by the state.

D. *A Reconciliation of Competing Interests.*

I think that the two interests discussed above can be accommodated through a doctrine which permits student editors of state newspapers unfettered discretion over what might be termed the "editorial product" of the newspaper, yet requires that when the newspaper devotes space to unedited advertisements or announcements from individuals outside the newspaper staff, access to such space must be made available to other similarly situated individuals on a nondiscriminatory basis.

I use "editorial product" to comprehend the news and editorial columns of the paper, and other sections that by tradition and popular perception would be subject to editorial input from the operators of a newspaper. Guest columns and letters to the editor, although closer to the borderline because of the authorship, probably would be included in this "editorial product" notion.[31]

As to the sections of the newspaper which would be subject to the requirement of nondiscriminatory access, I take the two sections of the *Reflector* at issue in this suit to be paradigmatic. According to the allegations of the MGA, the sections of the *Reflector* to which access was sought were regularly available to local organizations for announcements and messages of social, political and informative natures.[32] Also, the student

31. The location in the newspaper of guest columns and letters to the editor, as well as the perception that more of each may be submitted than editors care to print, supports an assumption that the editors at least choose what issues are to be discussed, if not what statements are to be made. Again, I do not consider whether a demand for "minimum access" might be strengthened by a student newspaper's regular acceptance of letters to the editor.

32. In deciding whether a public facility should be considered to be a public forum, we have used the following standard:

> The crucial query is whether or not the particular public facility involved in this litigation constitutes an appropriate place for the exercise of First Amendment rights. In order to answer this issue we consider the following factors relevant:
>
> "does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance."
>
> *Wolin v. Port of New York Authority*, 2 Cir. 1968, 392 F.2d 83, 89, cert. denied, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275.
>
> *Southeastern Promotions, Ltd. v. City of West Palm Beach*, 5 Cir. 1972, 457 F.2d 1016, 1019.

editors apparently do not purport to exercise editorial responsibility over the issues raised by or the content of these paid advertisements and unpaid announcements. No one would be likely to confuse statements appearing in them as officially endorsed by the students or the school.[33] Were there any problems in this regard, clear disclaimers as to the source of the messages easily could be added.[34]

I want to emphasize that the right of equal access I would invoke could, for the purposes of this case, be carefully circumscribed.[35] For example, the newspaper could perhaps provide access only to students or other members of the university community and not be guilty of content discrimination.[36] Perhaps access could even be restricted to local community businesses and groups.[37] The possibility of various source restrictions need

33. This case could perhaps be analogized to the situation of a large bulletin board centrally located in the student union building. Suppose school officials have left control of the board to a student group selected by other students. Suppose these students then determine that the major portion of the board is to be given over to thematic displays on selected topics of student interest, to be designed by the elected student group each week. Suppose further that the remainder of the board is to be used by anyone wishing to present a message of any kind to students generally. Perhaps the MGA could not require that it be allowed to present a display in the major portion of the board, but I doubt that the MGA could constitutionally be prohibited from posting an announcement on the "open forum" section of the bulletin board.

34. *Cf. Bazaar v. Fortune*, 5 Cir. 1974, 489 F.2d 225 (en banc).

35. An important modification on any right of access is the notion that certain categories of speech are constitutionally valueless, and thus may be legitimately suppressed on the basis of content. This "two-level" theory of speech has been subject to much criticism, *see, e. g. Karst, supra* note 16, at 31 ("The two-level theory is radically inconsistent with the principle of equal liberty of expression."); Kalven, "The Metaphysics of the Law of Obscenity," 1960 *Sup.Ct.Rev.* 1, 19, but the recent Supreme Court opinions cited in notes 6 through 12 indicate that the two-level theory is still with us. As demonstrated at the outset of this opinion, the MGA ad could not possibly be placed in any of the unprotected groups.

36. *See* Comment, "The Public School as Public Forum," 54 *Tex.L.Rev.* 90, 118–19 (1975). The state cannot, of course, arbitrarily discriminate in the recognition and access rights given to various student groups. *See Healy v. James*, 1972, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266; *Gay Students Organization v. Bonner*, 1 Cir. 1974, 509 F.2d 652. *But see Gay Lib v. University of Missouri*, W.D.Mo.1976, —— F.Supp. —— [45 L.W. 2021, June 29, 1976].

37. *Cf. Markham Advertising Co. v. State*, 1968, 73 Wash.2d 405, 439 P.2d 248, *appeal dismissed for want of a substantial federal question*, 1969, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512 (state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere).

Even broadly drawn and superficially content-neutral source restrictions may produce unjustifiable content discrimination. If the Radical Lawyer's Caucus can demand and acquire access to the State Bar Journal, why cannot the Radical Doctor's Caucus do the same?

For a discussion of a "limited public forum" (limited according to general subject matter), see *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, D.R.I. 1976, —— F.Supp. —— [44 L.W. 2577, June 9, 1976].

not be reached in this case, however. The allegations of the plaintiffs suggest that other local groups, similarly situated to the MGA, were allowed access to the advertising and "briefs" sections of the paper. If that is true, impermissible content discrimination will have been shown—the "state" cannot accept advertisements from some local groups and refuse those from others because of their content.

Conceivably, other limitations on the envisioned right of equal access could arise in response to logistics and cost. A state newspaper which had provided a public forum for the publication of any message from anyone could in one week receive thousands of proposed messages on the same subject. It may not be feasible to print them all.[38] A word-per-message limitation might be useful, but situations still might exist in which there were simply too many similar messages to print. If the "public forum" is to remain that, some content neutral means of selection would become necessary—*e. g.* requiring payment of a reasonable fee,[39] printing the first however many submissions, or selecting statements at random. Again, we need not reach these questions to decide this case. There is no indication that any other advertisements, or announcements in the "briefs" section, had ever been refused by the newspaper, or that any consideration of space limitations was relevant in the decision to exclude the MGA ad.

I mention these possible limitations on the right of equal access to a state student newspaper to illustrate how narrowly a decision in the instant case could be written, and how careful a court should be in delineating the scope of such a right. These factors are closely related, of course, to the notion that time, place and manner restrictions are permissible "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 1976, —— U.S. ——, ——, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346. The best way for the regulating agency to demonstrate that its restrictions are not based on content is through the formulation of specific rules governing what will and will not be published. When no rules guide the decision to exclude a controversial message from what otherwise appears to be a public forum, the courts are properly very skeptical of any proffered justification for the exclusion.[40]

38. *See* A. Meiklejohn, Free Speech and Its Relation to Self-Government 25 (1948) ("What is essential is not that everyone shall speak, but that everything worth saying shall be said."); *Karst, supra* note 16, at 39–41 (criticizing Meiklejohn's position).

39. The scope of any "reasonable fee" restriction need not be closely marked in this case. The MGA has alleged in effect that the *Reflector* provided both a paid and an unpaid public forum. If both in its paid advertising and its free announcements the *Reflector* regularly published submissions from groups similar in form to the MGA, the MGA's claim might well be upheld as to both sections of the paper.

One danger in such a limitation on the right of access, of course, is that if the fee is too high, the right becomes one available only to the wealthy. This was a concern expressed in the Chief Justice's opinion in *CBS*, discussed in note 21, *supra*.

40. *See Southeastern Promotions, Ltd. v. Conrad*, 1975, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448; *Southeastern Promotion, Ltd. v. City of West Palm Beach*, 5 Cir. 1972, 457 F.2d 1016. Of course, explicit regulations may reveal that the state is clearly engaged in content discrimination, but, in any event, judicial review will have been facilitated. *See Erznoznik v. City of Jacksonville*, 1975, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125; *Police Dep't of Chicago v. Mosley*, 1972, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212. *But see Young v. American Mini Theatres, Inc.*, 1976, —— U.S. ——, 96 S.Ct. 2440, 48 L.Ed.2d —— [44 U.S.L.W. 4999 1976.]

CONCLUSIONS

I think it must be plain by now that I consider this a most difficult area of conflicting first amendment interests. It should also be plain that I am convinced that the majority has reached an erroneous conclusion, and has failed adequately to consider the difficult issues actually presented in the case. As I have indicated, I would hold that there exists in some situations a right to nondiscriminatory access to the advertising and announcement sections of state-supported newspapers. I would remand this case to the district court for findings on state action (the nature of the funding, and the extent to which the *Reflector* can fairly be characterized as the official newspaper of MSU), on the other types of advertisements and announcements carried by the *Reflector* and on the practice followed by the student editors in rejecting advertisements.[41]

One reason for extreme caution in suggesting the sort of rules I have envisioned in my dissent is the danger that the state may provide "nondiscriminatory" access by providing no access, at least through the student newspapers under consideration here. While that danger counsels sensitivity in insuring that the requirements placed on the student newspapers are reasonable, I do not think that it should deter the courts from requiring the equality of access which the first amendment has properly been read to guarantee. I am not so cynical as to suppose that state school officials and student editors of state school publications would uniformly choose to permit no outside views to be expressed in their publications rather than to permit, in a designated section of the publication, a free and open discussion of public issues.

The accommodation of competing interests which I have tried to sketch in this opinion may seem, on the surface, to lead to anomalous distinctions, especially from the perspective of university officials. Students may not be censored in their decision to publish, nor countermanded in their fashioning of an "editorial product." Yet student editors may themselves be treated, in effect, as agents of the state in their dealings with the public. On close consideration, I feel, these lines are not anomalous.

Bazaar and the other cases discussed above placed in student hands the right to be free of official censorship and, by

41. One other aspect of this case, closely related to the "state action" issue discussed above, would be troubling on remand. Bill Goudelock, the former student editor of the *Reflector* and named defendant, has moved on to other endeavors. The plaintiffs have not attempted to substitute the successor editors as defendants in their official capacity. Arguably, then, the MSU officials are the only defendants against whom effective relief could be ordered. Are school officials to be ordered to keep hands off any decision made by student editors of student publications *except* when the decision is to refuse to publish some (but not all) advertisements from local groups, and in the excepted case are the officials to be ordered to compel the publication of all such ads? The result is not untenable, but it does sound a little strange. *Cf. Lee v. Board of Regents*, 7 Cir. 1971, 441 F.2d 1257. Declaratory relief would presumably be available against all defendants.

implication, the right to edit. Neither *Bazaar* not any other case, however, equips student editors of a state publication with the scyth of the censor to be used arbitrarily in cutting a few out of many submissions from the public. Although a bright line (*e. g.*, student editors of state publications have all the rights of private editors) might be easier to draw, I believe that when each side of the balance is weighted with important constitutional interests, the court cannot abdicate its calligraphic responsibility to draw careful lines reflecting the optimum accommodation of rights.

The key to the reconciliation here is an emphasis in each situation of the powerful interests of speakers and listeners in free expression. In each context—officials attempting to censor students, and students attempting selectively to censor certain messages from the public on the basis of content—the court must balance the competing interests, but always with its thumb of the side of full and open discussion of public issues.[42]

For the reasons stated, I DISSENT.

42. *See* Kalven, "The Concept of the Public Forum: *Cox v. Louisiana*," 1965 *Sup.Ct.Rev.* 1, —.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-4035

D.C. Docket No. EC-74-28-K

MISSISSIPPI GAY ALLIANCE and ANNE DEBARY,
Plaintiffs-Appellants

versus

BILL GOUDELOCK, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

August 12, 1976

GOLDBERG, Circuit Judge, dissenting.

Issued as Mandate: October 21, 1976

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

October 13, 1976

TO ALL COUNSEL OF RECORD

No. 74-4035 - Mississippi Gay Alliance, and Anne DeBary v. Bill Goudelock, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By _____
Deputy Clerk

/smg

cc: Mr. Mark Shenfield
Mr. Melvin L. Wulf
Mr. Ed Davis Noble, Jr.
Mr. Travis H. Clark, Jr.

P.S. GOLDBERG, Circuit Judge:

I would grant rehearding being of the opinion that the case should be reversed for the reasons set forth in my dissenting opinion.